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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ROBERT CHISLEY et al.,

Plaintiffs and Appellants,

v.

BARONA BAND OF MISSION INDIANS,

Defendant and Respondent.

D052468

(Super. Ct. No. 37-2007-00060464-
CU-PO-EC)

APPEAL from an order of the Superior Court of San Diego County, Jan I.

Goldsmith, Judge. Affirmed.

Robert and Gloria Chisley (the Chisleys) appeal from the trial court's order granting the motion to quash service of summons filed by defendant Barona Band of Mission Indians (Barona). As we will explain, we conclude that the trial court properly

concluded that Barona is protected by tribal sovereign immunity from suit in state court, and accordingly we affirm.¹

I

FACTUAL AND PROCEDURAL BACKGROUND

A. *Barona's Compact with the State of California and Its Tort Claim Ordinance*

Barona is a federally recognized Indian tribe that owns and operates the Barona Valley Ranch Resort & Casino (the Resort).² Barona entered into a compact with the State of California in October 1999 to allow it to operate gambling facilities within the state (the Compact). In the Compact, Barona agreed to maintain public liability insurance for claims made by patrons of the Resort and to adopt a tort liability ordinance setting forth the terms and conditions under which it would waive immunity to suit for damages resulting from injuries at the Resort. Section 10.2 of the Compact, as modified by modification No. 6, provides that with respect to its gaming operation Barona shall:

"(d) Carry no less than five million dollars (\$5,000,000) in public liability insurance for patron claims, and [Barona] shall request its insurer to promptly and fairly settle all valid claims; provided that nothing herein requires [Barona] to agree to liability for punitive damages, any intentional acts not covered by the insurance policy, or attorneys' fees. . . . [Barona] shall adopt and make available to patrons a tort liability ordinance setting forth the terms and conditions, if any, under which [Barona] waives immunity to suit for money damages resulting from intentional or negligent

¹ Barona has filed an unopposed request for judicial notice, containing an excerpt from the Federal Register and records from another state court action. The documents are proper subjects for judicial notice under Evidence Code sections 452 and 459, and we hereby grant the request.

² As Barona points out, its full and proper name as it appears in the Federal Register is Barona Group of Capitan Grande Band of Mission Indians.

injuries to person or property at the Gaming Facility or in connection with [Barona's] Gaming Operation, including procedures for processing any claims for such money damages; provided that nothing in this Section shall require [Barona] to waive its immunity to suit except to the extent of the policy limits and insurance coverage set out above."³

As required by the Compact, Barona adopted a tort claims ordinance.⁴ Under that ordinance, patrons with claims for compensatory damages against Barona are to file a claim with Barona within 180 days, and Barona is to forward the claim to its insurance carrier, who is to promptly investigate and advise the claimant whether it accepts or rejects the claim. Within 30 days, the claimant may then file an appeal with the Barona tribal court. An appeal is to be decided within 60 days after the conclusion of a hearing held by Barona's tribal court. Proceedings in the tribal court are conducted pursuant to

³ The modification to section 10.2(d) of the Compact states as follows: "(d) Carry no less than five million dollars (\$5,000,000) in public liability insurance for patron claims and ~~that [Barona] shall request its insurer to provide reasonable insurance that those claims will be paid~~ promptly and fairly settle all valid claims; provided that nothing herein requires [Barona] to agree to liability for punitive damages, any intentional acts not covered by the insurance policy, or attorneys' fees. . . . [Barona] shall adopt and make available to patrons a tort liability ordinance setting forth the terms and conditions, if any, under which [Barona] waives immunity to suit for money damages resulting from intentional or negligent injuries to person or property at the Gaming Facility or in connection with [Barona's] Gaming Operation, including procedures for processing any claims for such money damages; provided that nothing in this Section shall require [Barona] to waive its immunity to suit except to the extent of the policy limits and insurance coverage set out above." In quoting section 10.2(d) of the Compact in the text of our opinion above, we have set forth the substance of section 10.2(d) as modified, without including the strikethrough text and the underlining.

⁴ The version of the Tort Claims Ordinance in the record indicates that it is "Amendment No. 2," and it is dated September 28, 2004.

the Barona Code of Civil Procedure, which itself relies on the Federal Rules of Civil Procedure in the absence of a specific rule in Barona's own code.

Barona's tort claims ordinance contains several provisions discussing the limited extent to which Barona waives its tribal sovereign immunity to permit tort claims to be filed pursuant to the ordinance.

"IV. Limited Waiver of Sovereign Immunity

"A. The sovereign immunity of [Barona] shall continue except to the extent that it is expressly waived by this Ordinance. Officers of [Barona], including members of the Tribal Council, remain immune from suit for actions arising within the course and scope of their authority and duties.

"B. [Barona] and its enterprises, agencies and officers may be sued solely in Barona Tribal Court. [Barona] does not waive immunity from suit in any state or federal court.

"C. The sovereign immunity of [Barona] and its enterprises is waived in the following instances: [¶] 1. Injuries proximately caused by the negligent acts or omissions of [Barona], its enterprises, agencies and officers; [¶] 2. Injuries proximately caused by the condition of any property of [Barona] at its enterprises and agencies, provided that the Claimant established that the property was in a dangerous condition and [Barona] and/or its personnel had actual knowledge or constructive notice of the dangerous condition and sufficient time prior to the injury to take measures to remedy or protect against the dangerous condition; [¶] 3. Negligent acts or omissions of Tribal employees or agents within the course and scope of their employment or agency.

"V. Exclusive Remedy

"This Ordinance provides the exclusive procedure, forum and remedy for claims against [Barona], its enterprises, agencies, employees and officers."

B. *The Chisleys' Claims Against Barona*

The Chisleys were overnight guests at the Resort in August 2005. They allege that during the night, they were "bitten by bed bugs and/or scabies." The Chisleys filed a

claim for over \$2 million with Barona's insurance carrier in January 2006, which according to Barona, was accompanied by invoices totaling less than \$1,300 for a skin condition that the treating dermatologist determined was scabies. Barona's insurance carrier conducted an investigation and denied the claim.

In June 2006, the Chisleys, through their attorney, filed a notice of appeal with Barona's tribal court pursuant to the procedure set forth in Barona's tort claims ordinance. The case was litigated in the tribal court for over one year, including extensive discovery proceedings. The matter was scheduled to go to trial in the tribal court in August 2007, but when a discovery dispute arose in which Barona filed a motion for a protective order, complaining about the overbreadth of certain categories of documents in the Chisleys' request for production, the Chisleys canceled the trial date. At the tribal court hearing on Barona's motion for a protective order in July 2007, counsel for the Chisleys disclosed that the Chisleys would be filing a complaint in superior court. The tribal court judge stated that Barona would not submit to the jurisdiction of the superior court and would file a motion to quash.

The Chisleys filed this action on August 2, 2007. The Chisleys filed an amended complaint in this action on October 12, 2007.

The amended complaint, like the original complaint, contained five causes of action: (1) premises liability — negligence; (2) premises liability — dangerous condition on property; (3) negligent infliction of emotional distress; (4) loss of consortium by Robert Chisley; and (5) loss of consortium by Gloria Chisley. In their prayer for relief, the Chisleys sought compensatory and special damages. The amended complaint also

recited the history of the Chisleys' litigation against Barona in the tribal court and alleged that the tribal court could not fairly and promptly adjudicate the Chisleys' claims. In particular, the Chisleys alleged that they were "subject to a violation of due process" in the tribal court because the tribal court judge assigned to their case was an attorney in private practice who allegedly also served as general counsel for Barona.

After finding out that the Chisleys had filed this action, the tribal court judge dismissed the Chisleys' tribal court action on September 12, 2007.

C. *Barona's Motion to Quash Service of Summons*

Barona made a special appearance and filed a motion to quash service of summons on the ground of tribal sovereign immunity.⁵ Relying on the Compact and Barona's tort claims ordinance, as well as the recent opinion in *Lawrence v. Barona Valley Ranch Resort & Casino* (2007) 153 Cal.App.4th 1364 (*Lawrence*), Barona argued that it was protected by sovereign immunity from suit in superior court.

In opposition, the Chisleys argued that by entering into the Compact, Barona had waived its immunity to suit in superior court. The Chisleys also addressed what they perceived to be the "unfairness" of the situation in which they found themselves after the tribal court dismissed their case. Although such relief was not sought in their complaint, the Chisleys' opposition stated, "as requested by [the Chisleys] in this opposition, [Barona] should be ordered to state for what reasons [the Chisleys'] claims were

⁵ A motion to quash is one available procedural method for asserting tribal sovereign immunity. (*Great Western Casinos, Inc. v. Morongo Band of Mission Indians* (1999) 74 Cal.App.4th 1407, 1417.)

dismissed, and be ordered to continue the adjudication of [the Chisleys'] claims in its court either by arbitration or by a neutral judge who does not also serve as general counsel for [Barona]."

The trial court granted Barona's motion to quash service of summons, and the Chisleys filed a notice of appeal.

II

DISCUSSION

A. *Standard of Review*

We apply a de novo standard of review to the trial court's ruling on Barona's motion to quash service of summons. (*Warburton/Buttner v. Superior Court* (2002) 103 Cal.App.4th 1170, 1180 ["Generally speaking, the issue of whether a court has subject matter jurisdiction over an action against an Indian tribe is a question of law subject to de novo review"].)⁶

B. *Barona Is Immune from Suit in Superior Court Under the Doctrine of Tribal Sovereign Immunity*

Barona's motion to quash service of summons is based on the doctrine of tribal sovereign immunity. Under that doctrine, "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign

⁶ Where a jurisdictional dispute involves conflicting evidence, an appellate court applies analyzes whether a trial court's factual determinations are supported by substantial evidence. (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 449.) Here, however, the parties have not identified any conflicting evidence pertinent to the jurisdictional dispute.

powers.' (*Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 58.) Thus, '[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.' (*Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.* (1998) 523 U.S. 751, 754.) Any such authorization or waiver "'cannot be implied but must be unequivocally expressed.'" (*Santa Clara Pueblo, supra*, at p. 58)" (*Trudgeon v. Fantasy Springs Casino* (1999) 71 Cal.App.4th 632, 635-636, citation omitted.) In a tribe's motion seeking to quash summons on the basis of tribal sovereign immunity, the plaintiff bears the burden of proving by a preponderance of the evidence that jurisdiction exists. (*Lawrence, supra*, 153 Cal.App.4th at p. 1369.)

Barona argues that this court's decision in *Lawrence, supra*, 153 Cal.App.4th 1364, is dispositive of whether it is protected by sovereign immunity in this case. As we will explain, we agree.

In *Lawrence*, we reviewed a trial court's order granting a motion to quash service of summons filed by Barona in a personal injury lawsuit brought by a patron of the casino. In conducting our analysis, we considered the same Compact and the same Barona tort claims ordinance at issue here. Based on those documents, we explained that although "by entering into the Compact, Barona waived its sovereign immunity to certain negligence claims against it," that "waiver did not constitute a consent to suit in state court on negligence claims against it, but instead specified that the Barona Tribal Court was the exclusive forum for the resolution of such claims." (*Lawrence, supra*, 153 Cal.App.4th at p. 1370.) We explained that "the language of the Compact is unequivocal that, while Barona agreed to waive its tribal sovereign immunity to certain claims against

it, it was permitted to choose the forum for the resolution of those claims and the terms governing the process for such resolution" (*id.* at p. 1371), and we concluded that "Barona did not waive its sovereign tribal immunity, either in the Compact or in its tort claims ordinance, or otherwise consent to a suit against it in state court" (*Id.* at p. 1370.)

Here, because this case also presents the question of whether Barona waived its sovereign immunity by virtue of the Compact and its tort claims ordinance, *Lawrence* is directly applicable. As explained in *Lawrence*, although Barona waived its sovereign immunity in the Compact and the tort claim ordinance to the limited extent of allowing claims against it in tribal court up to the limit of its insurance coverage, it did not permit a suit to be filed against it in state court. Thus, we follow *Lawrence* to conclude that Barona did not waive its sovereign immunity to suit in state court.

The Chisleys argue that we should not follow *Lawrence* because the facts of that case were different. They argue that in *Lawrence*, the plaintiffs' claims had already been litigated to a judgment in the tribal court, whereas in this case, the tribal court case was not resolved on the merits. They claim that, therefore, "the *Lawrence* decision represents a certain deference by California Courts not to re-litigate issues that have been resolved in the Tribal Court, a type of tribal res judicata and collateral estoppel" which would not apply here. We reject this argument because it rests on a mischaracterization of *Lawrence*. Our decision in *Lawrence* was not based on principles of res judicata or collateral estoppel and did not depend on the fact that the plaintiffs' claim had been

litigated to judgment in the tribal court. Instead, our decision in *Lawrence* was based solely on principles of tribal sovereign immunity that are equally applicable to this case.⁷

The Chisleys argue that instead of being controlled by *Lawrence*, this case is controlled by our decision in *Campo Band of Mission Indians v. Superior Court* (2006) 137 Cal.App.4th 175 (*Campo*). To address this argument, we first focus on the decision in *Campo*. In that case, the Campo Band of Mission Indians (the tribe) entered into a compact with the State of California requiring it to adopt a tort liability ordinance. (*Id.* at p. 178.) The tribe adopted an ordinance which required an injured patron to make a

⁷ The Chisleys also point out that in quoting the relevant portions of the Compact, *Lawrence*, perhaps inadvertently, did not set forth the modifications to section 10.2(d) of the Compact, even though those modifications were part of the Compact as agreed to in 1999. (See *Lawrence*, *supra*, 153 Cal.App.4th at p. 1366.) The Chisleys contend that *Lawrence*'s analysis is therefore not controlling. We reject the argument. In relevant part, as quoted in *Lawrence*, section 10.2(d) of the Compact (before its modification) stated: "[Barona shall carry] no less than five million dollars (\$5,000,000) in public liability insurance for patron claims and . . . provide reasonable assurance that those claims will be promptly and fairly adjudicated, and that legitimate claims will be paid; provided that nothing herein requires [Barona] to agree to liability for punitive damages or attorneys' fees[,] provided that nothing in this Section shall require [Barona] to waive its immunity to suit except to the extent of the policy limits set out above.'" (*Lawrence*, *supra*, at pp. 1366-1367.) The modification reads, in relevant part, that Barona shall "[c]arry no less than five million dollars (\$5,000,000) in public liability insurance for patron claims and ~~that [Barona] shall request its insurer to provide reasonable insurance that those claims will be paid~~ promptly and fairly settle all valid claims; provided that nothing herein requires [Barona] to agree to liability for punitive damages, any intentional acts not covered by the insurance policy, or attorneys' fees . . . , provided that nothing in this Section shall require [Barona] to waive its immunity to suit except to the extent of the policy limits and insurance coverage set out above." The modifications to section 10.2(d) of the Compact, like the unmodified language quoted in *Lawrence*, contain no consent by Barona to suit against it in state court. Thus, section 10.2(d) of the Compact, as modified, provides no basis to conclude that Barona waived its sovereign immunity to suit in state court.

request for arbitration after exhausting the claims process with the tribe and its insurance carrier. (*Id.* at pp. 179-180.) The ordinance stated that in the event the tribe granted a request for arbitration "and the patron is successful in obtaining an arbitration award, the Tribe . . . consents to waive its sovereign immunity from suit for the limited and sole purpose of enforcing the arbitration award" on the condition, among others, that "[t]he suit must be an action to enforce the arbitration award and the relief sought is limited to specific performance." (*Id.* at p. 179.) Under the ordinance, because there was not an available tribal adjudicatory forum, a suit to enforce the arbitration award was to be brought in San Diego County Superior Court. (*Ibid.*) After the tribe rejected the plaintiff's claim for arbitration of her personal injury claim on the ground it was untimely and procedurally noncompliant, the plaintiff filed a lawsuit in superior court along with a motion to compel arbitration of her claim, and the tribe filed a motion to dismiss on the ground of sovereign immunity. (*Id.* at pp. 180-181.) The trial court granted the motion to compel arbitration. (*Id.* at p. 181.) In reviewing that decision on a petition for a writ of mandate, we held in *Campo* that by virtue of the language in the tribe's compact with the State of California and its tort liability ordinance, the state courts had jurisdiction over the tribe to issue an order compelling the tribe to participate in an arbitration (1) to determine whether plaintiff had followed the procedural requirements for requesting an arbitration, and (2) if so, to submit plaintiff's personal injury claim to arbitration. (*Id.* at pp. 183-186.)

Apparently recognizing that *Campo* did not hold that the state court had jurisdiction to adjudicate the *merits* of the plaintiff's personal injury claim, the Chisleys

do not rely on *Campo* to argue that the trial court has jurisdiction to adjudicate their complaint for damages against Barona. Instead, relying on *Campo*, the Chisleys argue that the trial court has jurisdiction to order Barona (1) to decide whether the tribal court litigation was improperly dismissed, and (2) if so, to proceed with the tribal court litigation.

"[T]he Chisleys respectfully request that the Court, as it did in *Campo*, reverse the trial court's decision and maintain limited subject matter jurisdiction and judicial oversight over the Chisleys' claims to ensure that their claims are considered and resolved. Specifically, the Chisleys request this Court to direct the state court to issue an order: (1) compelling [Barona] to submit the issue of whether the Chisleys' claims were properly dismissed according to the Barona Code of Civil Procedure and the Federal Rules of Civil Procedure to [Barona's] chosen forum; and (2) if [Barona's] forum concludes that the Chisleys' claims were not properly dismissed . . . compelling [Barona] to adjudicate the merits of the Chisleys' claims."

We reject the Chisleys' request because it is procedurally flawed. There was no pleading or motion before the trial court seeking an order requiring Barona to determine whether the tribal court action was improperly dismissed and, if so, to continue to litigate the tribal court action.⁸ That relief was not requested in the Chisleys' complaint. Instead, the Chisleys' complaint seeks a judgment awarding them compensatory and special damages in the superior court for the personal injuries allegedly suffered at the Resort. As it was not requested in the Chisleys' complaint, the relief requested in the Chisleys' appellate brief is not proper in this action. (See *Lawrence, supra*, 153 Cal.App.4th at

⁸ In *Campo*, in contrast, the trial court properly had before it a request to compel the tribe to engage in arbitration because it was ruling on the plaintiff's motion to compel arbitration. (*Campo, supra*, 137 Cal.App.4th at pp. 181, 186.) Thus, there was a procedural vehicle in *Campo* for ordering the relief requested by the plaintiff.

p. 1371 [rejecting the plaintiffs' argument that Barona waived sovereign immunity by allegedly failing to provide a fair forum, as "none of the causes of action set forth in the [plaintiffs'] complaint challenges the propriety of Barona's claims-handling procedures"].) In addition, not only is the Chisleys' requested relief absent from the complaint, the Chisleys also did not file a motion in the trial court asking for such relief.⁹ Thus, the issue is not properly before us on appeal. (*In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 117 [rejecting grounds for relief advanced for the first time on appeal because "[i]t is well established that issues or theories not properly raised or presented in the trial court may not be asserted on appeal, and will not be considered by an appellate tribunal"].)

In short, because the relief that the Chisleys seek on appeal is not contained in their complaint and was not presented to the trial court, we will not entertain the issue of whether the trial court would have jurisdiction to grant such relief or whether such relief is warranted.¹⁰

⁹ As we have explained, the Chisleys raised a similar request for relief in their opposition brief to the motion to quash service of summons in the trial court. There, the Chisleys stated that "[Barona] should be ordered to state for what reasons [the Chisleys'] claims were dismissed, and be ordered to continue the adjudication of [the Chisleys'] claims in its court either by arbitration or by a neutral judge who does not also serve as general counsel for [Barona]." This request for relief was also procedurally improper because it was neither made in a motion filed by the Chisleys nor pled as a form of relief sought in the Chisleys' complaint.

¹⁰ Although the parties extensively discuss whether *Campo* provides authority for the Chisleys' request for an order requiring Barona to review the dismissal of the tribal court action, we do not reach the merits of that issue, as we have determined that the issue is not properly before us.

In a related argument, the Chisleys contend that "[t]hey only seek that this Court enforce the terms of the Compact and ensure that [Barona] adheres to the terms and conditions set forth in its very own [tort claims ordinance,]" and they contend that the state courts have jurisdiction to grant that limited relief. However, the Chisleys' statement about the relief they seek directly contradicts the relief sought in the Chisleys' complaint. In that pleading, the Chisleys pray for an award of compensatory and special damages in the superior court to address the personal injury they allegedly incurred at the Resort. They do not seek an order enforcing the terms of the Compact. Moreover, even if the Chisleys had sought such relief, the Compact makes clear that they would not have standing under the Compact to bring such a suit and that the state courts would not have jurisdiction over the suit. The dispute resolution provisions of the Compact state that disputes over compliance with the Compact are to be decided in federal court, and the parties to that suit shall comprise only Barona and the State of California (unless a third party must be joined for jurisdictional reasons). (See also *Lawrence, supra*, 153 Cal.App.4th at p. 1371 ["the [plaintiffs] do not identify any provision of the Compact that authorizes an action by a private litigant in state court to raise such a challenge [to the tribe's claims-handling procedures]; in fact the Compact expressly provides that claims for violations thereof are to be brought in federal court (unless the federal court lacks the requisite jurisdiction)"].) Accordingly, there is no merit to the Chisleys' claims that the trial court should have ruled that it had limited jurisdiction over this lawsuit to enforce the terms of the Compact.

DISPOSITION

The trial court's order granting Barona's motion to quash service of summons is affirmed.

IRION, J.

WE CONCUR:

BENKE, Acting P. J.

O'ROURKE, J.